1989

Nationwide Insurance Company v. Fereidoun E. Pourmirzaie : Brief of Appellant

Utah Court of Appeals

Edward K. Brass; Attorney for Defendant/Appellant.
Joy L. Sanders; Snow, Christensen & Martineau; Attorneys for Plaintiff/Respondent.

IN THE UTAH COURT OF APPEALS

Nationwide Insurance Company Plaintiff-Respondent, vs. FEREIDOUN E. POURMIRZAIE, Defendant-Appellant.	)	Case No. 890563-CA (Priority No. 14b)

BRIEF OF APPELLANT

Appeal from a verdict and judgment awarding damages for fraud in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, presiding.

EDWARD K. BRASS
Attorney for Defendant-Appellant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 322-5678

JOY L. SANDERS
Attorney for Plaintiff-Respondent
SNOW, CHRISTENSEN & MARTINEAU
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE UTAH COURT OF APPEALS

Nationwide Insurance Company	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 890563-CA
	)	
FEREIDOUN E. POURMIRZAIE,	)	(Priority No. 14b)
	)	
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Attorney for Plaintiff-Respondent
SNOW, CHRISTENSEN & MARTINEAU
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JURISDICTIONAL STATEMENT

Jurisdiction in this court is predicated upon Section 78-2-2(3)(j), U.C.A. (1953, as amended 1988).

NATURE OF PROCEEDINGS

This is an appeal from a verdict in a civil trial awarding the respondent actual and punitive damages on a claim of fraud.

STATEMENT OF ISSUES

1. The lower court erred in refusing to grant a mistrial.

2. The lower court erred in permitting the jury to award punitive damages by a preponderance of the evidence.

3. The lower court erred in awarding the respondent attorney's fees.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.

Rules 403, 404 and 406, Utah Rules of Evidence.

Rule 39, Utah Rules of Civil Procedure.

Section 78-18-1, U.C.A. (1953, as amended).

Section 78-27-56, U.C.A. (1953, as amended).

STATEMENT OF THE CASE

a. Nature of the Case. This was a civil action for fraud in which the respondent sought damages for a false insurance claim together with punitive damages.

b. Course of proceedings. The respondent's complaint was filed on July 16, 1987 (R. 2). A jury trial was held on January 17 and 18, 1989.

c. Disposition in the lower court. The jury entered a special verdict on January 18, 1989, finding that the defendant had defrauded the plaintiff and awarding the plaintiff $29,150.00 in compensatory damages and $10,000.00 in punitive damages (R. 115). The Court subsequently entered judgment for those amounts plus $12,155.00 in interest, $263.60 in costs and $8,385.50 in attorney's fees (R. 173-174).

d. Statement of facts. The facts necessary to decide this case, including citations to the record, are contained in the argument.

SUMMARY OF ARGUMENT

1. The references by the respondent to the appellant's nationality, a purported effort on his part to pay someone to marry him and unrelated, alleged criminal activity by him warranted a mistrial.

2. The lower court should have instructed the jury that punitive damages must be proven by clear and convincing evidence rather than the preponderance standard.

3. The lower court erred in awarding the respondent attorney's fees for three reasons. First, the appellant was denied his right to a jury trial on this issue. Second, the Court failed to find that the appellant's defense was in bad faith and without merit, the necessary prerequisites for such an award. Third, even if it can be concluded that the defense was in bad faith and meritless, the lower court failed to apportion the fees sought between those which were incurred by reason of the defense and those which would have been incurred under any circumstances.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN REFUSING TO GRANT A MISTRIAL.

The respondent's counsel told the jury in her opening statement that in two years the appellant ". . .had set a record for frequency of claims, amount of claims and the sequence of claims, in that the car--he would add a car to the policy one week and the next week make a claim on it. These are fairly unusual claims," (Transcript, p. 7). She went on to say that two months after the car which is the subject of this action had been reported stolen, ". . .we got a claim. . .that his BMW had been stolen. So, after the BMW theft, we took a sworn statement from [him]," (Id.). Later, when the appellant testified, the respondent's counsel asked him if he had paid an American woman to marry him for citizenship

purposes, to which the appellant promptly objected (T. 17). The respondent attempted to ask another witness about other claims paid to the appellant which were ". . .later found out to be untrue," (T. 119). The theory counsel argued for admission of these "other claims" was predicated upon Rule 406, U.R.E. (T. 127). Counsel argued that the other claims would show a "routine or practice" of filing false claims. No effort was then made to substantiate that argument. Finally, when the appellant recalled a witness for the respondent, that witness volunteered that the appellant's name had been found on documents linked to unrelated criminal activity (T. 167). The appellant twice moved for a mistrial on the basis of all these statements (T. 125, 169). Each time the motion was denied.

The lower court erred in refusing to grant the motions. "A mistrial should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted," Watkiss & Faber v. Whiteley, 592 P.2d 613, 616 (Utah 1979). The cumulative effect of the respondent's efforts was to "thwart justice."

The appellant is an Iranian, not presently America's favorite ethnic group. Having established his origin, the respondent then attempted to prove he had once paid a woman to marry him so he could become a citizen four years before the events giving rise to this case occurred. The respondent, by its counsel and witnesses, attempted to portray the appellant as having the most suspicious claims history in the annals of Nationwide Insurance. The respondent's primary witness took it upon himself

to simply volunteer that the appellant's name had been linked to other perhaps similar criminal activity. All of these statements and testimony were inadmissible under Rules 403 and 404, U.R.E., as the Court below correctly ruled. However, in refusing to grant the mistrial motions, the Court chose to ignore the cumulative effect of the respondent's actions.

The respondent managed to convey to the jury that an Iranian had paid a woman to become a citizen; that he was the most suspicious client in the history of a major insurance company; and that he was involved in unrelated, possibly similar criminal activity. None of this had anything to do with the issues before the jury who heard the trial, yet all of it could only prejudice the jurors against the appellant. Applying the principle of the Watkiss & Faber case, it appears here that "justice was thwarted" and the motion should have been granted.

POINT II

THE LOWER COURT ERRED IN PERMITTING THE JURY TO AWARD PUNITIVE DAMAGES BY A PREPONDERANCE OF THE EVIDENCE.

In the event that this Court concludes it was not error to refuse to grant a mistrial, it should nevertheless reverse the award of punitive damages. The jury was instructed that the standard of proof in awarding punitive damages was preponderance of the evidence (R. 108, 109). The special verdict form contained the same language (R. 116). The appellant contended that the burden of proof was by clear and convincing evidence (T. 174). The appellant's position states the correct standard.

Oddly, no Utah case seems to have addressed this issue. However, this Court has recognized that "In order to recover punitive damages, a party must prove conduct that is willful and malicious or that manifests a knowing and reckless indifference toward, and disregard of, the rights of others. (Citations omitted.)" Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 967 (Utah App. 1989). The Arizona Supreme Court, in Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (1986), directly confronted the quantum of proof of such conduct as described in Amica which would be required before punitive damages could be awarded.

The Linthicum court wrote,

> As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort, we believe it is appropriate to impose a more stringent standard of proof. When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole. Additionally, its deterrent impact is lessened. Therefore, while a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind. See Tuttle v. Raymond, 494 A.2d at 1362-1363. In making this distinction, we are not alone. See, e.g., Tuttle v. Raymond, supra; Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); Or.Rev.Stat. §30.925 (1981); Minn.Stat.Ann. §549.20 (1984); See also Colo.Rev.Stat. §13-25-127(2) (1973) (proof beyond a reasonable doubt); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va.L.Rev. 269, 296-298 (1983) (recommending such a higher standard). We hold that the

> burden of proof for punitive damages is by clear and convincing evidence.

723 P.2d 675, 681.

It is to be noted that four months after the trial of this action, Section 78-18-1, U.C.A. (1953, as amended), took effect. That statute expressly states that proof of punitive damages shall be by clear and convincing evidence. This Court should adopt the spirit of that statute and the reasoning of Linthicum by holding the burden of proof in this state for punitive damages to be clear and convincing evidence. To rule otherwise would lead to the peculiar result of requiring a much higher burden for proof of fraud than is required for the attendant, and severe, punitive damages.

POINT III

THE LOWER COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES.

Again, if this Court rules that the denial of the mistrial motions was correct, then it should nevertheless consider whether it was error to award the respondent attorney's fees. The appellant contends it was error for any of three separate reasons.

A. Denial of jury trial.

The respondent was awarded attorney's fees in the sum of $8,385.50 (R. 174). The award was not made by the jury but was based on a post-trial affidavit (R. 123-124). The respondent argued that the appellant's counsel stipulated to such a procedure (R. 156). The appellant's former counsel denied any such agreement and argued that an award of fees was a jury question. The lower

court's award of fees without the participation of the jury was improper.

It is not necessary for this Court to resolve whether it was or was not agreed that fees could be awarded by the court rather than the jury. No such agreement appears in the record of this case. Rule 39(a)(1), U.R.C.P., provides in pertinent part that after a jury is demanded, the ". . .trial of all issues so demanded shall be by jury, unless (1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . ." (Emphasis added.)

In the absence of an "oral stipulation. . .entered in the record," this Court cannot assume the appellant waived his right to a jury trial on the issue of fees.

B. Failure to make appropriate findings.

In order to award fees under Section 78-27-56, "a trial court must make findings that 1) the claim or claims were 'without merit,' and 2) the party's conduct was lacking in good faith," Amica Mut. Ins. Co. v. Schettler, supra, at 966. The lower court here made no such findings, nor does the judgment, drafted by the respondent, contain them. Therefore, no such award should be made.

C. Failure to apportion fees.

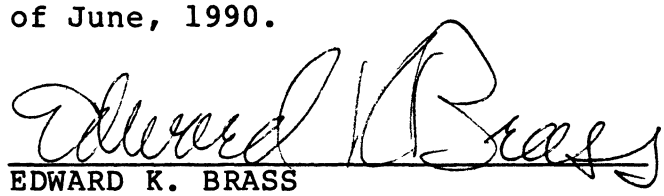
Section 78-27-56(1), U.C.A. (1953, as amended), permits fees to be awarded only to the extent that the ". . .defense to the action was without merit and in bad faith." Here, the lower

court's judgment awards fees for the entire time that respondent was represented by counsel. No showing was made as to what portion, if any, of the fee was necessitated by the purported bad faith/meritless defense raised by the appellant. Yet, that is the only portion for which the statute permits recovery. The Amica decision, supra, at 966, makes clear that such a failure is reversible error.

CONCLUSION

This Court should grant a new trial based upon the lower court's failure to grant a mistrial. If it chooses not to do so, then the award of punitive damages should be reversed because the jury was incorrectly instructed as to the burden of proof. The award of attorney's fees should be reversed for any of the reasons stated above.

Dated this 4 day of June, 1990.



EDWARD K. BRASS
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was mailed, postage prepaid, to Joy L. Sanders, P.O. Box 45000, Salt Lake City, Utah 84145, on the 4 day of June, 1990.

ADDENDUM

1. Jury Instruction No. 16 (R. 108)
2. Special Verdict Form (R. 115)
3. Judgment on Special Verdict (R. 173)
4. Rule 403, Utah Rules of Evidence
5. Rule 404, Utah Rules of Evidence
6. Rule 39, Utah Rules of Civil Procedure
7. Section 78-18-1, U.C.A.
8. Section 78-27-56, U.C.A.

ADDENDUM 1

INSTRUCTION NO. 16

In addition to compensatory damages, under certain circumstances the law permits the jury to award an injured party punitive damages. Punitive damages punish a wrongdoer and serve as a warning to others not to engage in such conduct.

The jury may award a plaintiff punitive damages in this case if it finds by a preponderance of the evidence that plaintiff has been damaged as a result of acts or omissions of the defendant done either willfully or maliciously, or with reckless indifference toward and disregard of that plaintiff's rights. An act or omission is done willfully if it is done intentionally. An act or a failure to act is "maliciously" done if it is prompted or accompanied by ill will, spite, or grudge. "Recklessly" means wantonly, with indifference to consequences. If a person makes a representation without knowing whether it is true or not, or makes it without regard to its truth or falsity or to its possible consequences, he may be found to have made the representation recklessly.

ADDENDUM 2

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

NATIONWIDE INSURANCE COMPANY, Plaintiff, -vs- FEREIDOUN E. POURMIRZAIE, Defendant.	: : : : : : :	SPECIAL VERDICT Civil No. C-87-04820 (Judge David S. Young)

We, the Jury in the above-entitled action, find as follows:

1. Did the defendant defraud plaintiff?

Yes 8

No 0

If you answered the foregoing question "yes," the Court will award plaintiff compensatory damages of $29,150.00 and you may answer question no. 2. If you answered the foregoing question "no," then do not answer question no. 2.

2. Do you find by a preponderance of the evidence that defendant ought to be punished and that plaintiff is entitled to punitive damages?

Yes 8

No 0

If you answered the foregoing question "yes," you may answer question no. 3.

3. What amount of punitive damages, if any, should be awarded plaintiff?

$ 10,000.00

DATED this 18 day of January, 1989.

Barbara Parker

FOREPERSON

ADDENDUM 3

RAYMOND M. BERRY, A0310
JOY L. SANDERS, A4138
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

2146544

3-14-89-809 am

NATIONWIDE INSURANCE COMPANY,	:	
Plaintiff,	:	JUDGMENT ON SPECIAL VERDICT
-vs-	:	
FEREIDOUN E. POURMIRZAIE,	:	Civil No. C-87-04820
Defendant.	:	(Judge David S. Young)

This case came on regularly for trial on January 17 and 18, 1989, the Honorable David S. Young presiding. The plaintiff was represented by Joy L. Sanders of Snow, Christensen & Martineau; the defendant was represented by Herschel Bullen of McDonald & Bullen. The Jury found on Special Verdict that defendant had defrauded plaintiff. The Court had previously instructed the Jury that in the event they found that defendant had defrauded plaintiff the Court would award plaintiff compensatory damages of $29,150.00. The Jury further found on the special

verdict by a preponderance of the evidence that defendant ought to be punished and that plaintiff was entitled to punitive damages in the amount of $10,000.00.

The parties had previously stipulated that the issue of attorney's fees and interest would be reserved for the Court after the Jury returned its verdict. Plaintiff is entitled to interest at the rate of 10 percent per annum from July 24, 1985, on the compensatory damages of $29,150.00, for a total amount of interest of $12,155.00 as of January 23, 1989.

Pursuant to the Memorandum of Costs and Disbursements filed herewith, the Court finds that the defendant must pay costs in the amount of $263.60.

Pursuant to the Affidavit of Joy L. Sanders filed herewith, the Court finds that the defendant must pay attorney's fees in the amount of $8,385.50.

In summary, therefore, the Court finds that the plaintiff is entitled to special damages in the amount of $29,150.00, plus prejudgment interest thereon in the amount of $12,155.00 as of January 23, 1989, plus punitive damages of $10,000.00, plus attorney's fees of $8,385.50, and costs of $263.60.

Now, therefore, it is ordered, adjudged, and decreed that:

JUDGMENT be, and hereby is, entered in favor of the plaintiff, Nationwide Insurance Company, and against the defendant, Fereidoun E. Pourmirzaie, in the sum of $59,954.10, with interest thereon at the rate of 12 percent per annum from the date hereof until paid.

DATED this 13th day of March, 1989.

BY THE COURT:

David S. Young
District Court Judge

APPROVED AS TO FORM:

McDONALD & BULLEN

By_____
Herschel Bullen
Attorneys for Defendant

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Cheryl A. Hunter, being first duly sworn, states that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Plaintiff herein, that she served the attached Proposed Judgment on Special Verdict in Civil No. C-87-04820, Salt Lake Co. Third District Court upon the following parties by placing a true and correct copy thereof in an envelope addressed to:

HERSCHEL BULLEN
American Plaza III
47 West 200 South, Suite 450
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 24th day of January, 1989.

Cheryl A. Hunter

SUBSCRIBED AND SWORN TO before me on this 24th day of January, 1989.

My Commission Expires:

Notary Public
Residing in the State of Utah

NOTARY PUBLIC
My Commission Expires 7-15-92
NA L. CAMPBELL
Exchange Place, 11th Fl
Salt Lake City
UT 84111

ADDENDUM 4

NOTES TO DECISIONS

ANALYSIS

Discretion of court.

The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976).

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979).

Irrelevant evidence.

Testimony as to impulsiveness of another participant in the crime had no bearing on defendant's guilt or innocence and was properly excluded as not relevant to defendant's participation in the crime. State v. Stephens, 667 P.2d 586 (Utah 1983).

Probability evidence.

Courts have routinely excluded probability evidence when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies. State v. Rammel, 721 P.2d 498 (Utah 1986).

Scientific evidence.

The *Frye* test (that scientific tests still in the experimental stages should not be admitted in evidence, but that scientific testimony deduced from a well recognized scientific principle or discovery is admissible if the scientific principle is sufficiently established) is a valid test, though not necessarily an exclusive test, for determining when scientific evidence is sufficiently reliable to be admitted and is not inconsistent with Rules 402, 403, and 702 of the Utah Rules of Evidence. Kofford v. Flora, 744 P.2d 1343 (Utah 1987).

Standard of review.

The judgment of the trial court admitting or excluding evidence will not be reversed unless it is shown that the discretion exercised therein has been abused. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979).

COLLATERAL REFERENCES

Utah Law Review. — United States v. Downing: Novel Scientific Evidence and the Rejection of Frye, 1986 Utah L. Rev. 839.

Note, Establishing Paternity Through HLA Testing: Utah Standards for Admissibility, 1988 Utah L. Rev. 717.

A.L.R. — Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Thermographic tests: admissibility of test results in personal injury suits, 56 A.L.R.4th 1105.

Criminal law: dog scent discrimination lineups, 63 A.L.R.4th 143.

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, 64 A.L.R.4th 125.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402

ADDENDUM 5

A.L.R. — Noncharacter witnesses in civil case, limiting number of, 5 A.L.R.3d 169.

Noncharacter witnesses in criminal case, limiting number of, 5 A.L.R.3d 238.

Character or reputation witnesses, propriety and prejudicial effect of trial court's limiting number of, 17 A.L.R.3d 327.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 A.L.R. Fed. 700.

Key Numbers. — Evidence ⇐ 143.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Advisory Committee Note. — This rule is the federal rule, verbatim. Provisions of this rule apply to character evidence to prove conduct, as distinguished from proof of character where character is an essential element of a charge, claim or defense. As to the latter, see Rule 405(b). See also Advisory Committee Note to Rule 404, Federal Rules of Evidence. Rule 47, Utah Rules of Evidence (1971) was comparable. See also State v. Day, 572 P.2d 703 (Utah 1977) (character evidence as to the character of the victim of a homicide was admissible to rebut the defendant's contention that the deceased was the aggressor). One significant difference between this rule and Rule 47, Utah Rules of Evidence (1971) is that there is no provision for the use of character evidence in civil cases, except where character is the ultimate issue in question, whereas Rule 47 authorized the use of character evidence in civil cases not only on the ultimate issue but where otherwise substantively relevant. See Boyce, Character Evidence: The Substantive Use, 4 Utah Bar J. 13, 18-19 (1976). However, Rule 48, Utah Rules of Evidence (1971) expressly excluded character evidence with respect to a trait as to care or skill. The Advisory Committee to the Federal Rules of Evidence concluded that the remaining justification for the admission of character evidence was so insignificant that character evidence in civil cases should not be admitted unless it was in issue.

Subdivision (b) is comparable to Rule 55, Utah Rules of Evidence (1971). State v. Forsyth, 641 P.2d 1172 (Utah 1982). See Boyce, Evidence of Other Crimes or Wrongdoing, 5 Utah Bar J. 31 (1977).

ADDENDUM 6

Right preserved.

—Appeal from industrial commission.

This trial rule is not applicable to trial de novo in the district court on appeal from industrial commission's decision on a sex discrimination in employment case. Beehive Medical Elecs., Inc. v. Industrial Comm'n, 583 P.2d 53 (Utah 1978).

—Court's discretion.

In circumstances where doubt exists as to whether a cause should be regarded as one in equity or one in law, wherein the party can insist on a jury as a matter of right, the trial court should have some discretion and may examine the nature of the rights asserted and the remedies sought in the light of the facts of the case to ascertain which predominates and, from that determination, make the appropriate order as to a jury or nonjury trial. Corbet v. Cox, 30 Utah 2d 361, 517 P.2d 1318 (1974).

Waiver.

—Failure to make written demand.

Failure to make a written demand for a jury trial upon the opposing party waives any error in a court's failure to grant a jury trial. Gasser v. Horne, 557 P.2d 154 (Utah 1976).

Cited in Stickle v. Union Pac. R.R., 122 Utah 477, 251 P.2d 867 (1952); Best v. Huber, 3 Utah 2d 177, 281 P.2d 208 (1955); Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Jury §§ 10, 57 to 69, 71, 81, 82, 84 to 89.

C.J.S. — 50 C.J.S. Juries §§ 10, 84 to 113.

A.L.R. — Obtaining jury trial in eminent domain; waiver, 12 A.L.R.3d 7.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties. 9 A.L.R.4th 1041.

Right to jury trial in stockholder's derivative action, 32 A.L.R.4th 1111.

Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Rule 38 of Federal Rules of Civil Procedure waived right to jury trial as revived by amended or supplemental pleadings, 18 A.L.R. Fed. 754.

Key Numbers. — Jury ⇐ 10, 25 to 28.

Rule 39. Trial by jury or by the court.

(a) **By jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) **By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory jury and trial by consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with

an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Compiler's Notes. — This rule is similar to Rule 39, F.R.C.P.

NOTES TO DECISIONS

Analysis

Advisory jury.

—Equity.

When there is a demand for a jury trial in an equity case, the jury will serve only in an advisory capacity unless both parties have clearly consented to accept a jury verdict. Romrell v. Zions First Nat'l Bank, 611 P.2d 392 (Utah 1980).

Trial court did not commit prejudicial error by allowing a jury to sit in an equity proceeding where the jury was retained merely as an advisory jury to consider the sole question of the reasonableness of plaintiff's reliance on defendant's act. Tolboe Constr. Co. v. Staker Paving & Constr. Co., 682 P.2d 843 (Utah 1984).

Trial by consent.

—Equity.

——Motion for directed verdict.

Where the case was essentially one in equity but the parties and court appeared to have consented to presenting their case to a jury whose verdict would have "the same effect as if trial by jury had been a matter of right," under Subdivision (c), the determination of whether a directed verdict was proper was to be tested by the same rules governing cases at law. Willard v. Milne Inv. Co. v. Cox, 580 P.2d 607 (Utah 1978).

Trial by court.

—Waiver of court trial.

Even though former statute providing for trial by court in absence of demand for jury was couched in mandatory terms, and a party might have an absolute right to have the issues tried by the court, the right could be waived, as by proceeding to trial before a jury. Houston Real Estate Inv. Co. v. Hechler, 47 Utah 215, 152 P. 726 (1915).

—Waiver of jury trial.

Where it did not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during trial against right of the court to try the case without a jury, it would be presumed on appeal that a trial by jury was waived. Perego v. Dodge, 9 Utah 3, 33 P. 221 (1893), aff'd, 163 U.S 160, 16 S. Ct. 971, 41 L. Ed. 113 (1896).

Trial by jury.

—Grant of jury trial.

——Absence of demand.

Court did not abuse its discretion in granting jury trial to defendant, under this rule, over plaintiff's objections although defendant had not made proper demand for jury trial under Rule 38, where plaintiff was not prejudiced thereby. James Mfg. Co. v. Wilson, 15 Utah 2d 210, 390 P.2d 127 (1964).

—Right.

——Quiet title action.

This rule gives the right to have any legal issue of fact tried by a jury upon proper demand, and plaintiff in an action to quiet title to mining claims was entitled to a jury trial on issues of fact. Holland v. Wilson, 8 Utah 2d 11, 327 P.2d 250 (1958).

Cited in Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956).

ADDENDUM 7

CHAPTER 18
PUNITIVE DAMAGES AWARDS

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

History: C. 1953, 78-18-1, enacted by L. 1989, ch. 237, § 1.

Applicability. — Laws 1989, ch. 237, § 4 provides that the act applies to all claims for punitive damages that arise on or after May 1, 1989.

Effective Dates. — Laws 1989, ch. 237, § 4 makes the act effective on May 1, 1989.

78-18-2. Drug exception.

(1) Punitive damages may not be awarded if a drug causing the claimant's harm:

(a) received premarket approval or licensure by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et seq. or the Public Health Service Act, 42 U.S.C. Section 201 et seq.;

(b) is generally recognized as safe and effective under conditions established by the Federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

ADDENDUM 8

History: L. 1977, ch. 143, § 1; 1989, ch. 241, § 8.

Amendment Notes. — The 1989 amendment, effective April 1, 1989, added the subsection designations, added Subsection (2)(b), substituted "section" for "act" in Subsection (3), and made stylistic changes.

COLLATERAL REFERENCES

A.L.R. — Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

78-27-51. Inherent risks of skiing — Public policy.

COLLATERAL REFERENCES

A.L.R. — Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 A.L.R.4th 632.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted the Subsection designation (1); deleted "where not otherwise provided by statute or agreement" following "civil actions" in Subsection (1); substituted "shall" for "may" following "the court" in Subsection (1); added "except under Subsection (2)" at the end of Subsection (1) and added Subsection (2).

NOTES TO DECISIONS

ANALYSIS

Findings.
Cited.

Findings.

Under this section, a trial court must make findings that: (1) the claim or claims were "without merit," and (2) the party did not act in good faith. Amica Mut. Ins. Co. v. Schettler, 100 Utah Adv. Rep. 17 (Ct. App. 1989).

Cited in Topik v. Thurber, 739 P.2d 1101 (Utah 1987); Hatanaka v. Struhs, 738 P.2d 1052 (Utah Ct. App. 1987); O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987); DeBry v. Occidental/Nebraska Fed. Sav. Bank, 754 P.2d 60 (Utah 1988); Taylor v. Estate of Taylor, 102 Utah Adv. Rep. 36 (Ct. App. 1989).